No. 90-1367
No. 90-1378

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

vs.

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,
Respondents,

– and –

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals for the Third Circuit affirming the district court's finding that non-settling defendants lack standing to challenge a partial settlement, where the decision below did not decide the questions presented by petitioners on subject matter jurisdiction and applied well-settled law to deny standing?

STATEMENT PURSUANT TO RULE 29.1

Respondent Lac d'Amiante du Quebec, Ltee is a wholly owned subsidiary of ASARCO Incorporated. Lac d'Amiante du Quebec, Ltee has no nonwholly owned subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lac d'Amiante du Quebec, Ltee ("LAQ") respectfully requests that this Court deny petitioners' writs of certiorari that seek review of the opinion of the United States Court of

Appeals for the Third Circuit, *In re School Asbestos Litigation*, Nos. 90-1247 & 90-1248, reported at 921 F.2d 1330.[1]

OPINIONS BELOW

The LAQ settlement opinion is reported at 921 F.2d 1330, and is reprinted in petitioners' appendices at Kaiser Appendices to Petition No. 90-1367 ("Kaiser App.") 1a-20a and U.S. Gypsum Petitioners Appendices to Petition No. 90-1378 ("U.S. Gypsum Pet. App.") 45a-63a. The opinion of the district court has not been reported. It is reprinted in petitioners' appendices at Kaiser App. 21a-26a and U.S. Gypsum Pet. App. 119a-124a.

STATUTORY PROVISION INVOLVED

No statutory provisions were involved in the LAQ settlement opinion.

STATEMENT OF THE CASE

The only facts essential to the Court's determination whether to grant or deny these petitions for certiorari, which seek review of the judgment and opinion of the Court of Appeals for the Third Circuit on the standing of Kaiser and U.S. Gypsum to contest the partial settlement between LAQ and plaintiffs, are these:

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[1] There are two petitions for writs of certiorari to review the court of appeals' opinion which affirmed a partial final judgment of the district court dismissing with prejudice the claims against settled defendant LAQ ("LAQ settlement opinion"). One petition, filed only on behalf of Kaiser Cement Corporation ("Kaiser"), seeks review of the LAQ settlement opinion alone. The other petition, filed on behalf of U.S. Gypsum Company ("U.S. Gypsum"), Kaiser Gypsum Company, Inc. (a subsidiary of Kaiser, represented in this action by the same counsel of record), W.R. Grace & Co. and Fibreboard Corporation (collectively, "the U.S. Gypsum petitioners") seeks review of both the LAQ settlement opinion and another court of appeals' opinion, which denied consolidated petitions for writs of mandamus and prohibition based on petitioners' failure to show that the district court lacked subject matter jurisdiction under 28 U.S.C. §1332(a) ("subject matter jurisdiction opinion"). In this brief, LAQ responds only to petitioners' requests for review of the LAQ settlement opinion.

The action from which these petitions arise is a class action on behalf of elementary and secondary schools seeking damages for the presence of asbestos-containing construction materials in their buildings. LAQ and class plaintiffs executed an agreement settling plaintiffs' claims against LAQ on March 31, 1989. The agreement called for LAQ to pay $1,000,000 to the class. In exchange, class members agreed to dismiss their claims against LAQ with prejudice. The settlement agreement specifically provides that in the event any defendant were to obtain a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against such defendant would be reduced by any "amount, percentage or share of such judgment attributable to LAQ."[3]

Kaiser and U.S. Gypsum opposed the district court's preliminary approval of the settlement between LAQ and class plaintiffs.[4] On November 22, 1989, the district court gave preliminary approval to the settlement between LAQ and plaintiffs as reasonable, adequate and fair, and directed that notice of the settlement be given to class members.

Kaiser and U.S. Gypsum also objected to the district court's final approval of the LAQ settlement. On February 16, 1990, the district court approved LAQ's settlement with the class and directed that final judgment be entered under Fed. R. Civ. P. 54(b). Kaiser App. 21a-26a, 30a-33a; U.S. Gypsum Pet. App. 119a-128a. The district court also held that Kaiser and U.S. Gypsum had failed to show they had standing to contest the settlement under any exception to the general rule that non-settling defendants lack standing to object to a partial settlement.

Kaiser and U.S. Gypsum appealed the district court's approval of the LAQ settlement, attacking the court's assertion of subject

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[3] The full text of paragraph 12 of the LAQ settlement agreement is set forth in the court of appeals opinion. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 9a; U.S. Gypsum Pet. App. 51a-52a.

[4] Petitioners W.R. Grace & Co. and Fibreboard Corporation did not challenge the LAQ settlement in the courts below.

matter jurisdiction and the process through which the court approved the settlement, but not the reasonableness of the LAQ settlement agreement itself. On December 13, 1990, in its LAQ settlement opinion, the court of appeals affirmed the judgment of the district court, holding that Kaiser and U.S. Gypsum lacked standing to challenge the settlement agreement between LAQ and the plaintiff class. *In re School Asbestos Litigation*, 921 F.2d 1330; Kaiser App. 1a-20a; U.S. Gypsum Pet. App. 45a-63a. The court of appeals found that appellants did not have standing based on any adverse effect on their contribution or indemnity rights because the settlement agreement and the order approving the settlement contained no limit on any claims of non-settling defendants. The court of appeals did not reach the issue whether adequate notice procedures were followed in the settlement approval process. Having determined in a separate opinion, filed the same day, that subject matter jurisdiction was proper in the district court, the court of appeals did not reconsider subject matter jurisdiction in the LAQ settlement opinion.

Following the court of appeals' denial of their petitions for rehearing and suggestions for rehearing *en banc*, Kaiser App. 83a-86a; U.S. Gypsum Pet. App. 79a-81a, petitioners sought writs of certiorari to review the judgments and opinions of the Third Circuit Court of Appeals. In these petitions, Kaiser and the U.S. Gypsum petitioners again argue that the district court lacks subject matter jurisdiction over the claims from which LAQ was dismissed. Only Kaiser argues that it was improperly denied standing by the court of appeals.

REASONS FOR DENYING THE WRITS

1. THE COURT OF APPEALS FOR THE THIRD CIRCUIT DID NOT DECIDE THE QUESTIONS PRESENTED BY THE U.S. GYPSUM PETITIONERS.

The court of appeals did not decide the questions raised by the U.S. Gypsum petition for writs of certiorari. In the LAQ settlement opinion, the court of appeals merely held that Kaiser and U.S. Gypsum lacked standing to challenge the LAQ settlement

agreement. *In re School Asbestos Litigation*, 921 F.2d at 1331-33; Kaiser App. 5a-10a; U.S. Gypsum Pet. App. 48a-53a. The court determined that Kaiser and U.S. Gypsum lacked standing because the settlement agreement specifically recognized the existence of non-settling defendants' indemnification and contribution rights against LAQ, and the district court's approval of the settlement contained no ruling purporting to limit any claims non-settling defendants may have. *Id.* at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The only Questions Presented by the U.S. Gypsum petitioners, *see* U.S. Gypsum Petition at i, concern the sufficiency of plaintiffs' allegations to support diversity subject matter jurisdiction, and diversity among individual members of a plaintiff class and defendants.* The court of appeals addressed these issues in a separate, comprehensive opinion holding that none of petitioners' arguments on jurisdictional defects demonstrated a lack of federal diversity subject matter jurisdiction to require dismissal of the action. *See In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990); Kaiser App. 34a-76a; U.S. Gypsum Pet. App. 1a-44a. Having found jurisdiction proper in the district court, the court of appeals did not and need not have re-determined in the LAQ settlement opinion whether plaintiffs' allegations supported subject matter jurisdiction over the action. Indeed, the court of appeals explicitly separated the issues raised in its two opinions, noting that it had concluded its treatment of the subject matter jurisdiction question before considering the appeal taken from the LAQ settlement. *In re School Asbestos Litigation*, 921 F.2d at 1332; Kaiser App. 5a-6a; U.S. Gypsum Pet. App. 49a.

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* The first of two Questions Presented by Kaiser, *see* Kaiser Petition at i, also seeks review of various subject matter jurisdiction issues. Although it also purports to challenge the dismissal of the class members' claims against LAQ, it does not seek review of the standing decision in the LAQ settlement opinion. Only Kaiser's second Question Presented concerns standing to challenge the LAQ settlement. The court of appeals had no occasion to consider the precise issue Kaiser raises in its second Question Presented, *viz.*, whether non-settling defendants can raise alleged defects in the settlement approval process. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The U.S. Gypsum petitioners have also sought writ of certiorari to review the court of appeals' subject matter jurisdiction opinion. *See supra* p. 2, note 1. The court of appeals did not decide subject matter jurisdiction in the LAQ settlement opinion, and writ of certiorari to review that opinion would not lead to consideration of the jurisdictional questions the U.S. Gypsum petitioners present.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN DENYING PETITIONERS STANDING TO CHALLENGE THE LAQ SETTLEMENT.

There is no conflict among the circuits on the legal standard a court should apply to determine whether a non-settling defendant has standing to object to a partial settlement. As set forth in the leading appellate authorities, a non-settling defendant does not have standing to object to a partial settlement unless it can show some cognizable prejudice to a legal relationship between it and the settling parties. *Waller* v. *Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987); *Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Utility Contractors Ass'n of New Jersey, Inc.* v. *Toops*, 507 F.2d 83 (3d Cir. 1974). The court of appeals employed this standard, *In re School Asbestos Litigation*, 921 F.2d at 1332-33; Kaiser App. 7a-8a; U.S. Gypsum Pet. App. 51a, and even the dissenting judge, upon whose opinion petitioners place so much reliance, agreed with the majority that this standard should apply. *Id.* at 1335; Kaiser App. 14a; U.S. Gypsum Pet. App. 57a.

Kaiser seems to suggest that the standard of law used by the court of appeals should not govern in this case.* The essence of

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* Kaiser argues that the standard applied by the court of appeals is inapplicable because it was developed in antitrust litigation where defendants have no rights

(Footnote continued)

Kaiser's position is that where there are rights of contribution or indemnity among defendants, any partial settlement may affect those rights, and therefore non-settling defendants should automatically have standing. Kaiser Petition at 28, n.17. In the standing analysis, however, there is no talismanic significance to non-settling defendants' rights to contribution or indemnity. The uncontroverted standard of law on non-settling defendants' standing to object to a partial settlement is applied where rights to contribution and indemnity are made an issue just as it is to any other issue. Any other rule would discourage settlements in complex litigation, because settlement would not fully extricate a defendant from the litigation in which he sought to buy his peace. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 9a-10a; U.S. Gypsum Pet. App. 52a.

No appellate court has found reason to vary the long-accepted standard on non-settling defendants' standing to contest partial settlements. The court of appeals employed the correct rule of law, and its decision raises no novel legal issue that requires review by this Court.

A. The Court of Appeals' Decision Correctly Applied Well-Settled Law.

The court of appeals' decision denying petitioners' claim that their rights to contribution or indemnity were prejudiced by the LAQ settlement is merely a case-specific application of the universally-accepted rule that a non-settling defendant does not have standing. The decision reflected an appropriate appellate response to review of a settlement agreement, which, like many settlements in multiple-defendant cases involving joint and

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of contribution at all. Kaiser Petition at 27-28, n.16. Kaiser is wrong. Although the Fifth Circuit's influential decision in *In re Beef*, which Kaiser cites to support its position, arose in the context of an antitrust class action, it was neither the first time such a standard was enunciated, *see Tsopa*, 507 F.2d at 86 (dispute between class of unions and class of municipalities over partial settlement), nor the only context in which the courts have applied this standard. *See, e.g., Waller*, 828 F.2d at 583 (Rule 10b-5 class action); *Quad/Graphics*, 724 F.2d at 1233 (corporate contract dispute).

several liability, preserved non-settling defendants' rights to contribution or indemnity in the form of a judgment reduction provision.

Kaiser argued below that it had suffered legal prejudice and hence had standing to challenge the LAQ settlement because the settlement agreement barred it from pursuing claims for contribution or indemnity against LAQ. The court of appeals held that petitioners had failed to demonstrate legal prejudice. Specifically, the court of appeals found that the settlement agreement expressly took account of these petitioners' rights of contribution and indemnity:

> [t]he settlement agreement in this case specifically recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have.

In re School Asbestos Litigation, 921 F.2d at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The court of appeals referred to paragraph 12 of the LAQ settlement agreement, which allows for the operation of state laws governing contribution and indemnity rights in partial settlements and accounts for non-settling defendants' rights to contribution and indemnity by incorporating a judgment reduction provision. This provision reflects the fact that, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), issues of indemnity or contribution in this diversity class action will be resolved under the differing laws of the jurisdictions in which the substantive claims of the class members arise.

As the court of appeals found, the terms of the LAQ settlement agreement expressly provide that in the event a non-settling defendant were to obtain a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against that defendant would be adjusted by any portion of

the recovery attributable to LAQ. When, as here, a settlement agreement specifically provides for non-settling defendants' rights to contribution and indemnity, the "legal prejudice" exception to the rule against co-defendant standing is not satisfied. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1387 n.11 (D. Md. 1983) (non-settling defendants lacked standing where settlement expressly provided for a *pro rata* reduction of damages against the non-settling defendants should settling defendants be liable for contribution under state law).[8] The LAQ settlement agreement does not, in and of itself, extinguish any of petitioners' legal rights and, as the court of appeals correctly found, neither did the district court's order approving the settlement.

It might be a different issue, but not the issue presented below, if a settlement agreement purported to ignore or defeat non-settling defendants' rights to contribution or indemnity as a condition of the settlement. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 232 (1990) (non-settling defendants in a securities class action had standing to object to a partial settlement that was expressly conditioned on obtaining an order from the district court barring non-settling defendants' pre-existing rights to contribution and indemnity). The court of appeals properly found that under the terms of the LAQ settlement, petitioners suffered no legal prejudice and hence had no standing.

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[8] *See also*, 2 H. Newberg, *Newberg on Class Actions* §11.54 n.472 (2d ed. Supp. 1990.)

When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants by the amount of any contribution judgment against settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, non-settling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement.

B. The Court of Appeals' Decision Denying Kaiser Standing Does Not Conflict With This Court's Decision In *Shutts*.

Petitioner Kaiser asserts, in reliance upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that it should have had standing to object to the district court's notice procedures to ensure that all class members are bound by the judgment reduction provisions of the settlement. Kaiser Petition at 29. Kaiser's argument is a tempest in a teapot. If in the future, a plaintiff were to challenge the *res judicata* effect of the judgment effecting the LAQ settlement and a court were to find that notice of the settlement had been inadequate, the judgment would not bind the plaintiff who had received inadequate notice. He would then be unable to share in the settlement proceeds and free to commence a separate action against LAQ. To the extent LAQ and Kaiser were both named in the subsequent action and Kaiser had a valid contribution claim against LAQ,[7] Kaiser could seek a judgment over for contribution or indemnity directly from LAQ in that later action. Conversely, if notice of the LAQ settlement was adequate, then the judgment effecting the settlement agreement is binding and the contribution and indemnity provisions therein can be enforced by Kaiser against class members.

This analysis is in no way altered by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* neither varies nor creates a new exception to the rule against standing for non-settling defendants to attack a partial settlement. *Shutts* was decided on the appeal of the sole defendant in the action following a final liability judgment against it. Kaiser conveniently overlooks this central — and dispositive — distinction between *Shutts* and the partial settlement posture

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[7] In this action, claims for contribution and indemnity between a supplier of raw asbestos fiber, such as LAQ, and a manufacturer of asbestos construction products, such as Kaiser, will largely, if not exclusively, be determined by their purchase and sale relationship. LAQ never supplied or sold any asbestos fiber to Kaiser.

in which the court of appeals considered the LAQ settlement. In *Shutts*, no other party shared the defendant's interest in ensuring the broadest possible preclusive effect of the judgment. Non-settling defendant Kaiser, however, suffers no legal prejudice as a result of being denied standing to critique the form or manner of notice of LAQ's partial settlement, because LAQ's interest in ensuring the maximum preclusive effect of notice to the class, and the district court's obligation to review the settlement notice, adequately protect Kaiser's interests as a matter of law. *See In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11, 14-15 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980) (non-settling defendant lacks standing to attack adequacy of partial settlement notice); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 172-73 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (same).

Kaiser cannot demonstrate that any feature of the LAQ settlement or the notice and approval procedures employed by the district court has injured it. Kaiser has retained the benefits of all rights it is entitled to under the law as a non-settling defendant. Kaiser cannot show legal prejudice, and thus has no standing.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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